No. 06-880

IN THE

Supreme Court of the United States

RDC GOLF OF FLORIDA I, INC.,
a Florida Corporation,
Petitioner,

v.

GEORGE P. APOSTOLICAS, individually and derivatively of
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeals of Florida for the Fifth District

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

a) Reason for filing Supplemental Brief

Petitioner RDC Golf of Florida I, Inc. ("RDC") files this Supplemental Brief to advise the Court of the Fifth Circuit's *en banc* decision in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, which was filed on January 18, 2007, and reported at 2007 WL 111343 (5th Cir. 1/18/07). At the time RDC filed its Petition, the Fifth Circuit had granted rehearing *en banc*, but it had not rendered its decision. (*See* Petition at 23).

b) Issues presented in the Petition

The issue presented in the instant Petition is what is the proper standard to be applied to vacate an arbitration award when an arbitrator fails to disclose a relationship with one of the parties. The Court addressed this issue in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). Since then, two conflicting interpretations of *Commonwealth Coatings* have developed. One line of authority interprets Justice Black's opinion as a majority and applies a broader standard where any undisclosed relationship between an arbitrator and a party which would create an "impression of possible bias" warrants vacating the arbitration award. The other line of authority interprets Justice Black's opinion as a plurality and would vacate an arbitration award only where the undisclosed relationship creates demonstrable bias. The Court should resolve this split of authority as to the standard to be applied when an arbitrator fails to disclose a relationship with one of the parties.

c) The Fifth Circuit's *en banc* decision in *Positive Software* highlights the conflict among the Circuits

In the panel decision, the Fifth Circuit applied the broader standard, holding that "an arbitrator selected by the parties

displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality." *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 502 (5th Cir. 2006). The *en banc* court, by an 11-5 vote, reversed the panel decision.[1] The *en banc* majority followed the line of cases applying the narrower standard. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 2007 WL 211343 at 4, slip op. at 11-12. While the *en banc* majority applied a "reasonable impression of partiality" standard, it held that the standard should be "interpreted practically rather than with utmost vigor" and discarded the "might create" emphasis applied by the panel.

The Fifth Circuit's *en banc* opinion is a microcosm of the split of authority among the Circuits and among the states set forth in RDC's Petition.[2] The *en banc* majority interpreted Justice Black's *Commonwealth Coatings* opinion as a plurality, with Justice White's concurring opinion limiting Justice Black's, so that the more narrow standard applicable to non-disclosure cases was the correct one.

> How *Commonwealth Coatings* guides this court is a critical issue. Reasonable minds can agree that *Commonwealth Coatings*, like many plurality-plus Supreme Court decisions, is not pellucid. Justice Black delivered the opinion of the Court and imposed "the simple requirement that arbitrators disclose to the parties any

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[1] We have been advised by Positive Software's counsel that they also intend to seek certiorari from this Court on the same issues presented in RDC's Petition.

[2] The *en banc* decision also resolved conflicts between the state and federal courts in Louisiana and Missippi, but created a conflict in Texas as to the standard to be applied in non-disclosure cases. *Compare In re Arbitration between U.S. Turnkey Exploration, inc. and PSI, Inc.*, 577 So.2d 131, 135 (La.Ct.App. 1991); *Herrin v. Milton M. Stewart, Inc.*, 558 So.2d 863, 865 (Miss. 1990); *Burlington Northern Railroad v. Tuco, Inc.*, 960 S.W.2d 629, 632-636 (Tex. 1997).

dealings that might create an impression of possible bias." [393 U.S.] at 149, 89 S.Ct. at 339. He noted that, while arbitrators are not expected to sever all ties with the business world, courts must be scrupulous in safeguarding the impartiality of arbitrators, who are given the ability to decide both the facts and the law and whose decisions are not subject to appellate review. *Id.* at 148-49, 89 S.Ct. at 339. Thus, arbitrators "not only must be unbiased but also must avoid even the appearance of bias," *Id.* at 150, 89 S.Ct. at 340, in order to maintain confidence in the arbitration system.

Justice White, the fifth vote in the case, together with Justice Marshall, purported to be "glad to join" Justice Black's opinion, but he wrote to make "additional remarks." *Id.* (White, J., concurring). Justice White emphasized that "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." *Id.* Indeed, Justice White wrote that arbitrators are not "automatically disqualified by a business relationship with the parties before them if . . . [the parties] are unaware of the facts but the relationship is trivial." *Id.* While supporting a policy of disclosure by arbitrators to enhance the selection process, Justice White also concluded, in a practical vein, that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Id.* at 151, 89 S.Ct. at 340. His opinion fully envisions upholding awards when arbitrators fail to disclose insubstantial relationships. *Id.* at 152, 89 S.Ct. at 341.

If one lays primary emphasis on Justice White's statement that he was "glad to join" the plurality, his opinion can be deemed reconcilable with that of Justice Black. Only in that event is the plurality opinion binding on lower courts.

Another compelling reading of the opinions is also possible, however. Justice Black's opinion uses an egregious set of facts as the vehicle to require broad dis-

> closure of "any dealings that might create an impression of possible bias." *Id.* at 149, 89 S.Ct. at 339. Justice White, for his part, hews closely to the facts and finds it "enough for present purposes to hold, as the Court does, that where the arbitrator has a *substantial interest* in a firm which has done *more than trivial business* with a party, that fact must be disclosed." 393 U.S. at 151-52, 89 S.Ct. at 340-41 (emphasis added). Justice White, thus read, supports ample but not unrealistic disclosure, and he supports a cautious approach to vacatur for non-disclosure. His "joinder" is magnanimous but significantly qualified.
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> The latter reading is more persuasive, because it accords scope to the full White opinion, unlike the view that focuses on the introductory "glad to join" sentence. Thus, Justice White's concurrence, pivotal to the judgment, is based on a narrower ground than Justice Black's opinion, and it becomes the Court's effective ratio decidendi.

Positive Software, at 2-3; slip op. at 6-8. The *en banc* majority believed that a majority of the Circuits shared this view.[3] *Id.* Summing up, the majority of the *en banc* court held

> As we have concluded, the better interpretation of *Commonwealth Coatings* is that which reads Justice White's opinion holistically. The resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The "reasonable impression of bias" standard is thus interpreted practically rather than with utmost rigor.

Id. at 4; slip op. at 11-12.

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[3] The Fifth Circuit significantly downplays split among the Circuits on this issue. As is set forth in RDC's Petition, even with the *Positive Software en banc* decision moving the Fifth Circuit among the courts following the narrower standard, there is still nearly an even split among the Circuits and states as to which standard should be applied. (*See* Petition at 23-25).

The dissents, one of which was written by the author of the panel opinion, believed that, contrary to the *en banc* majority, Justice Black's opinion was a majority, not a plurality, opinion and his "impression of possible bias" standard should be applied. *Id.* at 6-12; slip op. at 18-23. Judge Reavley, who wrote the panel decision, read Justice Black's and Justice White's opinions in *Commonwealth Coatings* as being perfectly compatible, so that Justice Black's opinion represented a majority of the Court.

> The *Commonwealth Coatings* opinions of Justice Black (with Warren, Douglas, and Brennan joining) and Justice White (with Marshall joining) are not lengthy. They are easily compared and easily reconciled. Both opinions emphasize the importance of impartiality for those who decide controversy. Justice White distinguishes the role of judges from that of arbitrators in that the arbitrator's relation with a party is immaterial-so long as the other party is informed in advance and makes no objection. And he points out that a trivial relation would not create an impression of possible bias so as to meet the rule stated by Justice Black. Justice White's contribution emphasizes the importance of establishing an atmosphere of frankness at the outset of an arbitration by disclosure when the parties are free to reject the arbitrator or accept him with knowledge of the relationship. I am confident that Justices White and Marshall knew what they were saying when they said they joined Justice Black's opinion, and were not describing it as the majority opinion only to be "magnanimous" as our court now says. Furthermore, it is quite pellucid that six Justices of the Court agreed that, despite the fairness and impartiality of the arbitrator, failure to disclose "any dealings that might create an impression of possible bias" justifies vacatur of the award. The Court did vacate that award only for that reason.

Id. at 6-7; slip op. at 19-20.

Judge Rea[illegible] believed that the two lines of authorities has evolved beca[illegible] some of the Circuits disapprove of the standard set in *Commonwealth Coatings*, and that they, and the *en banc* majority in *Positive Software*, have manufactured the theory that Justice Black's opinion was only a plurality to justify not following his "impression of possible bias" standard. As a majority opinion, the lower courts are obligated to follow Justice Black's *Commonwealth Coatings* opinion, whether they like it or not.

> The majority opinion manages to substitute actual bias, or the reasonable impression of bias, or concrete impression of bias for the Supreme Court's ruling that dealings that might create only an impression of possible bias must be disclosed. And it purports to join other circuits to hold that non-disclosure alone does not require vacatur of an arbitral award. If the circuit courts could overrule the Supreme Court, the majority might be on a bit firmer ground, because the *Commonwealth Coatings* ruling has not been well received by some of the circuit courts.
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> The majority departs from the Supreme Court's ruling by following those courts that have decided that *Commonwealth Coatings* is a plurality or a "plurality-plus" opinion. But the majority opinion, like the opinions on which it relies, do not explain how Justice Black's majority opinion is irreconcilable with Justice White's concurrence. Aside from Justice White's statement that he was glad to join the majority opinion and the substance of his remarks, Justice White did not articulate an alternative rationale. Justice White merely stated what the Court did not hold, which is not inconsistent with the majority opinion.
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> The judicial disfavor of *Commonwealth Coatings*, while receiving surprisingly little treatment, has not gone

> unnoticed by commentators. One observed that "[f]ederal courts have floundered in the wake of *Commonwealth Coatings*" treating Justice White's concurrence as authoritative and standing for a different holding even though Justice White "does not expressly define the standard that should govern arbitrator conduct. His opinion only makes it clear that . . . arbitrators will be governed by a standard less than the standard governing judges." Elizabeth A. Murphy, Note, *Standards of Arbitrator Impartiality: How Impartial Must They Be?*, 1996 J. Disp. ResolL. 463, 470.
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> While I can understand the desire to protect the finality of arbitration awards and avoid a return to extended court expense and delay, this does not justify evading the law of the Supreme Court by misstating it or by avoiding it by bleaching the evidence of possible partiality. Nor should we miss the need to promote the impartiality of arbitrators in this time when that is the favored method of dispute resolution. Influence can so easily corrupt the decision-making process even when it is not recognized by the magistrate or arbitrator himself. And to prove bias or improper influence is rarely possible. It is imperative that we not allow even the good faith or memory of the potential arbitrator to control the disclosure decision for, as the Justices made clear in *Commonwealth Coatings,* it is the protection and reassurance of the party that matters most.

Id. at 7-8, slip op. at 20-23.

Judge Weiner joined Judge Reavley's dissent but also wrote separately to emphasize the importance to the arbitration process of arbitrators' disclosure of any relationships with the parties. Such disclosure is vital because of the different selection process of arbitrators and judges and the surrender of procedural protections by the parties when they choose arbitration over litigation. Because of these differences, Judge Weiner believed that Justice White's remarks about the disqualification of arbitrators because of a prior relationship

with the parties, language that the cases interpreting following the narrower interpretation of *Commonwealth Coatings* have seized upon, dealt with a completely different issue than the relationships an arbitrator should disclose.

> The penumbral point that supervenes this case lies in our recognition of the legal distinction between *disclosure* and *disqualification* in the context of arbitration. Justice White, in his celebrated and thoroughly vetted concurrence in *Commonwealth Coatings Corp.*, "remarked" that the Supreme Court was *not* deciding that "arbitrators are to be held to the *standards of judicial decorum* of Article III judges" or that arbitrators are "automatically *disqualified* by a business relationship" with the parties to arbitration or their counsel. What must be emphasized is that Justice White did *not* "remark" that the differences between the standards of decorum applicable to judges and those to which arbitrators are held has anything at all to do with the immutable prerequisite that, before the parties sign off on a candidate for arbitrator, they must have received from him an unexpurgated disclosure of absolutely every past or present relationship with the parties and their lawyers. That the potential arbitrator himself might deem one or more of such relationships to be so *de minimis* as not to require its divulgence is irrelevant; such culling of information by a candidate must never be allowed to seep interstitially into the *disclosure* calculus. Justice White's remark that *disqualification* is not automatic for minor business relationships is simply inapposite to the requirement of full *disclosure* of every relationship, large and small. This is because, in arbitration, disqualification (more accurately, rejection) is the exclusive province of the parties, each of whom is entitled to make its determination on the basis of total disclosure of relationships, not on the basis of some truncated version that has been cherry-picked by the nominee for the position of arbitrator.

Id. at 10; slip op. at 28-29. (emphasis in original).

Judge Weiner explained that parties choosing to arbitrate their disputes gain speed, informality, cost savings, and a decision maker familiar with the subject matter of the dispute, but give up the rules of evidence, rules of civil procedure and appellate review. Federal judges, who would be the decision makers in litigation, have a rigorous background check with respect to their capabilities, experience and integrity and they serve as decision makers full time. Further, the parties generally have no choice with respect to which judge will decide their case. On the other hand, arbitrators are selected by the parties, based upon information provided to them by the arbitrators themselves. Because of the different selection process in arbitration, the only insurance the parties have against selecting possibly biased arbitrators is full disclosure from the arbitrators of any relationships with the parties, so the parties, not the arbitrators, can decide what relationships are or are not important.

> In exchange for the actual or perceived economies of time, money, expertise and confidentiality, the parties to arbitration alone are responsible for who it is that will decide their fates. Subject to only relatively insignificant limitations, the parties (or in the case of panels, each party's selected arbitrator) have virtually absolute control over accepting or rejecting a nominee for the role of decision maker. It cannot therefore be left to the fox, who is the potential arbitrator, to guard the arbitration henhouse, secretly identifying to himself alone all "prior or present relationships," then just as secretly deciding which are worthy of disclosure and which are not. On the contrary, avoidance of partiality in the selection of the arbitrator can be achieved only if, in discharging his duty of disclosure, the potential arbitrator objectively disgorges absolutely every conceivable fact of prior or present relationships with parties or counsel, regardless of how tenuous or remote they might seem to him. He must leave to the parties the value judgment as to which

(if any) among those fully disclosed facts constitutes a basis for rejecting the potential arbitrator for bias or the appearance of bias. Only of and after that is done can *disclosure* translate into *disqualification* or rejection.

Thus the system fails when the nominee for the post of arbitrator takes it upon himself to make the value judgment whether a relationship is so inconsequential that it need not be disclosed at all. Arbitration's scant protection against bias and favoritism obviously breaks down completely when the question whether a relationship should be disclosed is assumed *sub silentio* by the potential arbitrator rather than by disclosing all and allowing the parties to make that call following their receipt of all facts through an unabridged disclosure.

Id. at 11-12; slip op. at 30-34 (emphasis in original)

CONCLUSION

For the reasons set forth above and in RDC's Petition, there is a clear and irreconcilable conflict among the Circuits and the states as to the standard to be applied in cases where an arbitrator fails to disclose a relationship with one of the parties, a conflict that is underscored by the majority and dissenting opinions from the *en banc* panel in *Positive Software.* The Court should grant certiorari to resolve that conflict.

Respectfully submitted,

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